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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. CARL MONTIGUE LEWIS et al., Defendants and Appellants.	C034860 (Super. Ct. No. 98F07013)

The defendants participated in a burglary during which the victim, Jean Suter, suffered fatal injuries. They had also participated in an earlier robbery. Convicted by jury of burglary, robbery, and felony murder, with the special circumstance that the murder took place during a burglary, the defendants were sentenced to identical terms of life without possibility of parole plus four years in state prison.

On appeal, defendant Carl Montigue Lewis contends (1) the trial court erred when it instructed the jury concerning the duration of a burglary, (2) the court's instructions concerning the elements of the special circumstance were incomplete, (3) the evidence was insufficient to sustain the special circumstance finding, and (4) the prosecutor violated Lewis's constitutional rights by exercising peremptory challenges based on group bias. Defendant Tymel L. Adams joins in Lewis's contentions and further asserts (1) his statement was taken in violation of his *Miranda*[1] rights, (2) there was insufficient evidence to sustain the felony murder conviction, and (3) the punishment constitutes cruel or unusual punishment.

Finding no prejudicial error, we affirm.

FACTS[2]

During the summer of 1998, Adams, 18 years old at the time, lived in the Pheasant Pointe Apartments in Sacramento. Lewis, who was 27 years old, frequently visited the same apartments, where he met and became friends with Adams. They also became acquainted with Jovan Hall.

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[1] *Miranda* v. *Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

[2] In this recitation of facts, the inferences from the evidence are drawn in favor of the judgment against the defendants. (See *In re James D.* (1981) 116 Cal.App.3d 810, 813.)

Robbery of Steve Baker

On July 28, 1998, at about 1:00 a.m., Adams or Lewis kicked in the door of an apartment in the Stonecreek Apartments, across the street from the Pheasant Pointe Apartments. One of the occupants of the apartment, Steve Baker, came out of his bedroom to investigate the noise and was confronted by Adams, who said: "Where's the money?" Adams threatened to kill Baker if Baker called 911. Baker said he had no money, so Adams slapped him on the chest several times and again demanded to know where was the money. Lewis entered the apartment and grabbed a VCR, which Adams pointed out to him. Adams took a watch, cellular phone, wallet, and keys that were on top of a piano, and both Adams and Lewis left the apartment. Adams returned to the apartment the next day and tried to gain access using the keys he had taken but was scared off by Alan Sheridan, another resident of the apartment. Adams and Lewis later bragged and laughed about the robbery.

Murder of Jean Suter

At about 9:20 p.m. on August 6, 1998, the power went off in the Pheasant Pointe Apartments and the Stonecreek Apartments across the street. Adams, Lewis, and Hall were together in the Pheasant Pointe Apartments. They huddled together and whispered to each other, then borrowed a flashlight and went across the street to the Stonecreek Apartments.

Dennis Sawyer, a security guard on duty in the Stonecreek Apartments, encountered 80-year-old Jean Suter, a Stonecreek tenant, on a walkway. She did not have her purse. They briefly

discussed the power outage, after which Suter headed off in the direction of her apartment. After Suter left, Sawyer saw Adams approach carrying what was later identified as Suter's purse.

About five minutes later, Lewis stood on a garbage can and jumped over a fence surrounding the pool area. On the ground in the pool area, he left the flashlight the men had borrowed. After jumping over the fence, he shouted: "Damn you, Jovan." He encountered Norma Stang, another Stonecreek tenant, and said, "Out of my way, bitch." He bumped into her as he headed out of the apartment complex.

Sawyer, having heard the commotion caused by Lewis's use of the garbage can, went to the pool area and spoke to Stang. She pointed out the flashlight. On his way around to get inside the pool area to retrieve the flashlight, Sawyer found Suter lying on the ground directly in front of her apartment. She was trying to get up but could not. Asked what had happened, she replied that she did not know what had happened or where she was. Sawyer told her she was in front of her own apartment. The door was wide open. He helped her to her feet and into the apartment. By the light of the flashlight he was carrying, Sawyer did not notice any injuries on Suter. To him, she did not seem to be in pain or to have difficulty breathing.

Adams and Lewis returned to the Pheasant Point Apartments with Suter's purse, which contained her cellular phone and credit cards. Calls were made on Suter's cellular phone that evening and the next day to Adams's girlfriend, Adams's uncle, Hall's cousin, and a friend of both Hall and Adams.

Adams and Lewis went with a friend to get marijuana. While in the car, Lewis chided Adams, saying: "I should kick your ass for leaving me." And later: "I had to hit this mother fucker upside the head." Adams grinned, but seemed to be afraid of Lewis.

The next day, on August 7, 1998, Suter was found in her bed in a coma and near death. She had injuries from four separate blunt force blows. Two blows to the head caused bruising, swelling, and a subdural hematoma. Two blows to the body caused bruising, swelling, a broken clavicle, a broken rib, and a punctured lung. These forceful blows could have been inflicted by the flashlight Adams and Lewis took to the apartments. An investigation revealed vomit on the floor in front of the chair where Sawyer left Suter, in the bathroom sink, and in the toilet bowl. Suter was taken to the hospital and put on life support.

The screen from the window to Suter's bedroom was lying on the ground and there were shoe prints on the window sill that were consistent with some of the shoes later seized from Adams and Lewis. Suter's purse and a jewelry box from her bedroom were missing. Several drawers of the dresser and filing cabinet were open.

Also on August 7, 1998, Adams went to Arden Fair Mall with Suter's credit cards and cellular phone. He and a friend used the cards to make purchases. When Lewis heard about Suter's death from a television report, he caught a bus to Colorado, where he had a job offer.

When it became clear, on August 8, 1998, that further treatment would be futile, Suter was taken off life support, and she died. An expert opined that Suter could have sustained her injuries before Sawyer found her outside her apartment. The brain injury would have caused her slowly to deteriorate but was still consistent with moments of lucidity during which she encountered Sawyer, went into the bathroom, and got into bed.

Adams was arrested on August 8, 1998. He admitted going to the Stonecreek Apartments during the power outage to commit a burglary. He stated that he entered Suter's apartment through the front door and took her purse. He saw Suter as he was leaving the area. Lewis was arrested in Colorado on August 21, 1998. He also admitted involvement in the burglary during the power outage. He entered the apartment through the window, stole the jewelry box, and exited through the front door. He claimed he bumped into an elderly woman and she spun around but did not fall down. He jumped over the pool fence and lost the flashlight he was carrying.

PROCEDURE

Adams and Lewis were charged and convicted by jury of robbery of Steve Baker, residential burglary, and first degree murder of Jean Suter. The jury also found true the special circumstance that the murder was committed during the commission of burglary. Hall was also charged with residential burglary and first degree murder but was acquitted of the charges. Adams and Lewis were each sentenced to life without possibility of

parole for first degree murder with the sentence for burglary stayed, plus four years for robbery. Both appeal.[3]

DISCUSSION

I

Felony Murder Rule Instructions

[Lewis I, Adams joins][4]

The felony-murder rule was enacted to protect the public, not to benefit criminals. (*People v. Chavez* (1951) 37 Cal.2d 656, 669-670.) For the purpose of the felony-murder rule, a burglary committed by more than one person continues during the burglars' escape until all burglars reach a place of temporary safety. (*People v. Bodely* (1995) 32 Cal.App.4th 311, 314 (hereafter *Bodely*); *People v. Fuller* (1978) 86 Cal.App.3d 618 (hereafter *Fuller*), cited in *People v. Cooper* (1991) 53 Cal.3d 1158, 1169.) This rule concerning the duration of a burglary is referred to as the "escape rule." "'[T]he escape rule serves the legitimate public policy considerations of deterrence and culpability' by extending felony-murder liability beyond the technical completion of the crime. [Citation.]" (*Bodely, supra,* at pp. 313-314.)

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[3] In a letter submitted after Lewis filed his opening brief, Adams adopted the arguments in Lewis's opening brief. (See Cal. Rules of Court, rule 13.)

[4] The bracketed information at the beginning of each issue reflects the numbering of the issues in the defendants' opening briefs.

Consistent with *Bodely* and *Fuller*, the jury was instructed as follows: "For the purpose of determining whether an unlawful killing has occurred during the commission or attempted commission of burglary, the commission of the crime of burglary is not confined to a fixed place or a limited period of time. [¶] A burglary is in progress after the original entry while the perpetrator is fleeing in an attempt to escape. [¶] A burglary is complete when all perpetrators have reached a place of temporary safety. [¶] If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of burglary, all persons who either directly or indirectly or actively commit the act constituting that crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime, and with intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental."

The defendants assert *Bodely* and *Fuller* were decided incorrectly because they did not properly take into account whether the burglary and the killing were part of one continuous transaction. Therefore, they urge, the trial court erred in instructing pursuant to *Bodely* and *Fuller*. We disagree.

"Under the felony-murder rule, 'the evidence must establish that the defendant harbored the felonious intent either prior to or during the commission of the acts which resulted in the

victim's death . . . .' [Citation.] First degree felony murder does not require proof of a strict causal relation between the felony and the homicide, and the homicide is committed in the perpetration of the felony if the killing and the felony are parts of one continuous transaction." (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1016.) The *Bodely* court relied on the "one continuous transaction" test when it approved the "escape rule." It noted: "Since the application of the escape rule to burglary is consistent with the 'one continuous transaction' test, we conclude that felony-murder liability continues during the escape of a burglar from the scene of the burglary until the burglar reaches a place of temporary safety." (32 Cal.App.4th at p. 314.)

In *People v. Eaker* (1980) 100 Cal.App.3d 1007, the court approved an instruction imposing felony-murder liability if the burglary and homicide were part of one continuous transaction. The court held: "If the homicide was committed during an escape from the burglary, it was a part of one continuous transaction; therefore, the court properly instructed the jury. (*Id.* at pp. 1011-1012.)

The defendants assert the holding in *Eaker* required a "one continuous transaction" instruction in this case, instead of an "escape rule" instruction. "Otherwise," the defendants contend, "a burglar who has departed the burglarized structure and is in the process of escape could be held liable for a separate and independent killing committed by a co-burglar that was entirely unrelated to the burglary and/or be held liable for a killing

that occurred during a new burglary that was not the natural consequence of the first burglary." (Underlining in original.) This reasoning fails.

As held by the Supreme Court in *Ainsworth*, "felony murder does not require proof of a strict causal relation between the felony and the homicide . . . ." (45 Cal.3d at p. 1016.) The defendants' reasoning, however, seeks to impose a causal relation test. The felony-murder rule imposes liability on escaping burglars as a matter of public policy. (*People v. Bodely, supra,* at pp. 313-314.) Furthermore, the defendants' apparent concern that they might be held liable for an unrelated murder is unfounded because the jury was instructed that, to find the defendants guilty of felony murder, it had to find the killing occurred "during the commission or attempted commission of burglary . . . ." If the defendants wanted further clarification in this regard, they had the responsibility to request it. (*People v. Alvarez* (1996) 14 Cal.4th 155, 222-223.) The trial court did not err in instructing the jury using the escape rule.

II

Special Circumstance Instructions

[Lewis II, Adams joins]

In *Tison v. Arizona* (1987) 481 U.S. 137 [95 L.Ed.2d 127], the United States Supreme Court concluded the Eighth Amendment does not prohibit the death penalty for a felony murderer who was not the actual killer and who did not intend to kill, but, rather, was a major participant in the underlying felony who

harbored a mental state of "'reckless indifference to . . . human life.'" (481 U.S. at pp. 152, 158.) *Tison* defined "major participant" as a defendant who is actively involved in every element of the underlying felony and is physically present during the entire sequence of criminal activity culminating in the murder. (*Id*. at p. 158.) *Tison* defined "reckless indifference to human life" as a subjective appreciation, or knowledge, by the defendant that his acts are likely to result in the taking of innocent life. (*Id*. at pp. 152, 157-158.)

After *Tison*, the Legislature amended Penal Code section 190.2 to add the language from *Tison* concerning special circumstance liability for a co-perpetrator who was not the actual killer. The California Supreme Court, in *Tapia v. Superior Court* (1991) 53 Cal.3d 282, noted that section 190.2, subdivision (d), "brings state law into conformity with *Tison* . . . ." (53 Cal.3d at p. 298, fn. 16.)

Consistent with Penal Code section 190.2, the trial court instructed the jury using CALJIC No. 8.80.1, as follows:

"The People have the burden of proving the truth of the special circumstance. [¶] If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true. [¶] If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the Defendant was the actual killer or an aider and abettor, you cannot find the special circumstance to be true as to that Defendant unless you are satisfied beyond a reasonable doubt that such Defendant, with reckless indifference to human life,

and as a major participant aided and abetted in the commission of the crime of burglary which resulted in the death of a human being namely, Jean Suter. [¶] A Defendant acts with reckless indifference to human life when that Defendant knows or is aware that his acts involve a grave risk of death to an innocent human being."

On appeal, the defendants argue that the instruction was insufficient because, even though it informed the jury that a co-perpetrator who was not the actual killer could not be held responsible for felony murder unless he acted with reckless indifference to human life, the instruction did not prohibit the jury from finding that a defendant acted with reckless indifference to human life based solely on the fact that the defendant participated in the burglary, the underlying felony. They argue the instruction did not prevent "the jury from making its 'reckless indifference' finding in the abstract based on felony murder simpliciter,[5] i.e., defendant's knowing participation in a felony that resulted in death and constituted first degree felony-murder." (Underlining in original, citation omitted.) They contend that a trial court must instruct "that participation in an underlying felony that results in a felony-murder death is insufficient for a 'reckless indifference' finding and that the actual circumstances of the criminal activity must, as a natural consequence, carry a grave risk of

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5 "Simpliciter" in this context means "taken alone." (Garner, Dict. of Modern Legal Usage (2d ed. 1995) p. 809.)

death." (Underlining in original.) We conclude that the instruction properly conveyed the requirement in *Tison* and Penal Code section 190.2, subdivision (d) that the non-killer acted with reckless indifference to human life.

Contrary to the defendants' argument, the instruction, as given, required the jury to determine a non-killer's mental state -- that is, whether he acted with reckless indifference to human life. In so instructing, the court did not allow the jury, either expressly or by implication, to forego its duty of determining the non-killer's mental state by presuming the non-killer harbored the required mental state simply because he engaged in burglary. The jury was instructed to determine whether the non-killer acted with reckless indifference to human life, and we presume the jury followed this instruction. (See *People v. Harris* (1994) 9 Cal.4th 407, 425-426.)

The defendants further argue that the prosecutor led the jury to believe it could find the non-killer acted with reckless indifference to human life simply because he participated in a burglary. This argument is not supported by the record.

During closing argument, the prosecutor made the following statements concerning a finding of reckless indifference to human life:

"Reckless indifference to human life means that the defendant knows or is aware that his acts involve a grave risk of death to an innocent human being. [¶] How do we know that occurred in this case? It's [a] pretty simple concept, policy behind this. That is your home is your castle. [¶] You enter

someone's home. Either the person who owns the home could be hurt perhaps while someone is fleeing, perhaps [because] they're surprised, the perpetrator, and a fight breaks out. [¶] Perhaps because the person inside has a heart attack, or it could be because that person inside has a weapon, that is the homeowner, and shoots the person or stabs or commits some other sort of attack on the person entering their home. [¶] So reckless indifference to human life means you know when you go in there that somebody, and it might be the worst case scenario, but nonetheless if you enter that home somebody could get hurt and die. [¶] Jovan Hall was on the stand. He knows, he knows this. He told you in fact that that was one of the reasons in his lecture to [Adams] for not going in the burglary at all. [¶] He was saying, well, one, it's trespass, and two, someone could be inside, and somebody might get hurt or injured. That was his reasoning for telling [Adams] not to go in there in the first place. [¶] If Mr. Hall knows that, I think it's clear that Mr. Adams knows that and Mr. Lewis knows that. It's reckless. [¶] You go into somebody's house at night, all the lights are out. That is a reckless indifference to human life. [¶] It's completely reckless to enter someone's house. You don't know if you're gonna get shot or somebody's in there. [¶] They knocked on the door. They took some precautions, but they entered the house. But while they're fleeing even, trying to get away, somebody can get injured. That's a special allegation here."

While the prosecutor discussed the elements of burglary, he tied those elements to the actual circumstances of this case. He also discussed facts that were not elements of the burglary but revealed the non-killer's state of mind. For example, the plan was undertaken at night, with knowledge that someone could discover them, despite their apparent precautions to avoid detection.[6] Neither the instructions nor the prosecutor's argument misrepresented the requirements of *Tison* and Penal Code section 190.2, subdivision (d). Accordingly, we conclude the trial court did not err.

Given this conclusion, we need not reach the Attorney General's contention that, because Lewis was the actual killer, he did not have standing to argue the instruction was improper.

III

Sufficiency of Evidence of Felony Murder

[Adams II]

Adams contends the evidence was insufficient to support his conviction for murder under the felony-murder theory. The contention is without merit.

On appeal "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a

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[6] In any event, the trial court instructed the jury to disregard the statements of the prosecutor to the extent they conflicted with the law as given by the court.

reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People* v. *Johnson* (1980) 26 Cal.3d 557, 578.) Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom. (*In re James D., supra,* 116 Cal.App.3d at p. 813.)

Instead of taking into account all of the evidence, Adams picks three circumstances that he believes exculpate him. To the contrary, none of his selected factual circumstances exculpates him.

First, Adams claims the victim "showed no signs of physical injury" when Sawyer, the security guard, found her on the ground and helped her into her apartment. Not so. Sawyer found the 80-year-old victim on her back, lying on the concrete, in front of her apartment. She did not know what had happened, where she was, or how she got there. She was unable to stand without help. While it is true that Sawyer did not notice bleeding or bruising, that failure was not inconsistent with physical injury. The only lighting was the moon and a flashlight. Sawyer did not attempt to determine whether she had suffered physical trauma. Indeed, the expert testimony established that her condition at the time Sawyer found her was consistent with the trauma to her head and body that eventually resulted in her death.

Second, Adams asserts "the encounter between Sawyer and Suter occurred shortly after Sawyer had encountered two of the defendants, one of whom was carrying Suter's purse." Combined with his claim concerning her lack of physical injury when

Sawyer helped her to her apartment, this circumstance, speculates Adams, leads to the conclusion that the victim was assaulted and received her fatal injuries after Sawyer found her and, therefore, after the defendants had left. We have already debunked Adams's notion the victim had not already received, before Sawyer found her, the injuries that would eventually cause death. Hence, Adams's assertion Sawyer found the victim and helped her into her apartment after the defendants had left the scene is not exculpatory.

And third, Adams claims "the instrumentality of the injuries could only be identified in the most general way; the flashlight Carl Lewis was carrying could not be excluded as the instrumentality, but there was no evidence whatsoever to narrow the field of potential murder weapons." The implication of this claim is that the prosecution must conclusively identify a murder weapon. This, of course, is not true. From the evidence, the jury could reasonably infer Lewis used the flashlight to inflict the victim's injuries.

Out of his selected factual circumstances from the record, Adams constructs the possibility that there was a second burglary in which he was not involved, at which time the victim received the fatal injury. He then declares that the "second-burglary scenario is *more* likely true than the single-burglary scenario." (Italics in original.) This argument is idle speculation, has no merit at all, and ignores the proper standard on review requiring us to draw inferences in favor of the judgment.

Beyond discussing the three circumstances he asserts exculpate him, Adams does not consider the evidence against him in making his argument concerning the sufficiency of the evidence. Suffice it to say, the factual circumstances he asserts tend to exculpate him do not do so when considered in the light most favorable to the judgment. We conclude that substantial evidence supports the felony-murder conviction.

IV

Sufficiency of Evidence of Special Circumstance

[Lewis III, Adams joins]

[Adams III]

Both defendants assert the evidence was insufficient to establish they acted with reckless indifference to human life and, therefore, the special circumstance finding must be reversed. We must consider this argument separately as to each defendant because, while there was sufficient evidence Lewis was the actual killer, there was no evidence Adams was the actual killer.

As Lewis acknowledges, the requirement of finding reckless indifference to human life before finding true a burglary special circumstance does not apply if there was sufficient evidence for the jury to conclude that the defendant was the actual killer. (See Pen. Code, § 190.2 [requiring reckless indifference only if defendant not actual killer]; see also *People v. Smithey* (1999) 20 Cal.4th 936, 1016 [same].) Since we conclude there was sufficient evidence for the jury to conclude

that Lewis was the actual killer, we need not consider his reckless indifference argument.

Lewis admittedly encountered Suter as he was exiting the apartment. He asserted he merely bumped her, but the evidence, including his proximity to her, her injuries, and the likelihood that the injuries were caused by the flashlight he was carrying, support the inference he beat her, striking her at least four times with considerable force. Additionally, he criticized Adams for leaving him at the apartment and stated he had hit Suter "upside the head."

As to Adams, the analysis is necessarily different. There was no substantial evidence he was the actual killer; the Attorney General seems to concede as much. However, the evidence he acted with reckless indifference to human life is substantial.

To establish reckless indifference to human life, the prosecution need not prove the defendant attempted or intended to kill the victim. Instead, as the jury was instructed, "[a] [d]efendant acts with reckless indifference to human life when that [d]efendant knows or is aware that his acts involve a grave risk of death to an innocent human being." (See *Tison v. Arizona, supra,* 481 U.S. at pp. 150-157.)

Adams went to the Stonecreek Apartments intending to commit a burglary. Just days earlier, he had committed a violent entry into an apartment, assaulting the occupant and demanding money. This time, he went with intent to commit a crime in the dark. He claims he made sure there was no one inside before entering;

however, the jury was not bound by his claim. Indeed, a burglar can never be certain no one is in a home into which he enters. Here, there was evidence entry was made through the window and the apartment, fortuitously being temporarily empty, was searched for valuables. Adams knew the occupant could return at any time. His history shows he was willing to use force to complete his crimes. Committing the crime in concert with Lewis made it easier to use violence to accomplish their goal by overpowering the occupant.

Residential burglary, especially under the specific circumstances of this case, including a nighttime entry during a power outage, poses a serious risk to innocent human beings. (See *People v. Elsey* (2000) 81 Cal.App.4th 948, 963 [noting the dangerousness of residential burglary].) In the dark, a victim is more likely to happen upon the criminal unexpectedly, exactly as happened here. Furthermore, violence is more likely to take place with the combination of surprise and close proximity. This violence, intensified by the criminal's desire to complete the crime and escape and by the victim's natural impulse to protect life, limb, and abode, poses a grave risk of death to an innocent human being. Adams's was not a harmless prank gone awry; it was an inherently and specifically dangerous crime exhibiting reckless indifference to human life. The evidence was sufficient to sustain the special circumstance finding.

V

Use of Peremptory Challenges

[Lewis IV, Adams joins]

Lewis and Adams are African-American, as were four of the 100 prospective jurors in the jury panel. During the jury selection process, the prosecution used two of its peremptory challenges to excuse two African-American women. The defendants objected each time, based on *People v. Wheeler* (1978) 22 Cal.3d 258. The trial court, however, found there was no prima facie showing of group bias and overruled the defendants' objections without requiring the prosecutor to state reasons for exercising the peremptory challenges.[7]

The defendants assert the trial court erred in finding they had not made a prima facie showing that the prosecution violated their constitutional rights under *People v. Wheeler, supra,* 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69]. They contend the trial court applied the wrong legal standard in determining whether a prima facie showing had been made and improperly found such showing had not been made. These contentions are without merit.

"'It is well settled that the use of peremptory challenges to remove prospective jurors solely on the basis of a presumed group bias based on membership in a racial group violates both

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[7] The record does not reflect whether the two remaining African-American prospective jurors eventually served on the jury.

the state and federal Constitutions.' [Citations.] Under *Wheeler* and *Batson*, '"[i]f a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, . . . he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood [or reasonable inference] that such persons are being challenged because of their group association . . . ."' [Citations.]" (*People v. Box* (2000) 23 Cal.4th 1153, 1187-1188.)

The California Supreme Court has declared, in *People v. Box, supra,* 23 Cal.4th at page 1188, footnote 7, that, in order to determine whether there is a prima facie showing of group bias under *People v. Wheeler, supra,* 22 Cal.3d 258, the court must determine whether a *reasonable inference* arises that peremptory challenges are being used on the ground of group bias. This declaration resolved a split in Court of Appeal decisions. In *People v. Fuller* (1982) 136 Cal.App.3d 403, Division One of the Fourth Appellate District, presaging *Box*, decided that the proper standard was whether there arose a *reasonable inference* of group bias. In *People v. Bernard* (1994) 27 Cal.App.4th 458, however, Division One of the Fourth Appellate District disagreed with *Fuller* and held that the

proper standard was whether a *strong likelihood* of group bias had been shown.

There is no indication in the record concerning which standard the trial court used in concluding there was no prima facie showing of group bias. Because *Box* was decided after the trial in this case, the defendants assert the trial court was bound, under stare decisis, by *Bernard* and therefore applied the improper standard. To the contrary, stare decisis did not bind the trial court to apply the improper *Bernard* standard. When opinions of the Court of Appeal conflict, the trial court must apply its own wisdom to the matter and choose between the opinions. (*McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4.) "As a practical matter, a superior court ordinarily will follow an appellate opinion emanating from its own district even though it is not bound to do so. Superior courts in other appellate districts may pick and choose between conflicting lines of authority. This dilemma will endure until the Supreme Court resolves the conflict, or the Legislature clears up the uncertainty by legislation." (*Ibid*.)

Because the trial court was not bound by *Bernard* and there is no indication that the court applied the improper standard, we will not presume so. Instead, we presume correctness. (See Evid. Code, § 664 [presuming official duty performed].) An appellant bears the burden of affirmatively showing error on appeal. (See *People v. Coley* (1997) 52 Cal.App.4th 964, 972.) The defendants have not done so here.

The defendants also assert the trial court erred in finding that no reasonable inference of bias existed. "'When a trial court denies a *Wheeler* motion because it finds no prima facie case of group bias was established, the reviewing court considers the entire record of voir dire.' [Citation.] 'If the record "suggests grounds upon which the prosecutor might reasonably have challenged" the jurors in question, we affirm.'" (*People v. Box, supra,* 23 Cal.4th at p. 1188.) Contrary to the defendants' suggestion, the prosecutor had reasonable grounds to challenge the African-American prospective jurors.

During general questioning of the prospective jurors concerning whether a family member had been charged with a crime, Sallie T., one of the African-American prospective jurors, responded: "Oh, I have numerous people in jail in my family." She further explained her cousins were incarcerated for armed robbery and muggings in Sacramento County. While she asserted she would not be biased as a result of her family situation, the fact she had family members incarcerated for crimes in Sacramento County was a ground for a reasonable challenge by the prosecutor because it was evidence that she could be biased against the prosecution. (See *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1689 [finding reasonable use of peremptory challenge when family members of prospective juror had criminal records].)

Veronica M., another African-American prospective juror, had previously served on a jury that did not reach a verdict. She was a long-time Sacramento resident, who works for the state

and has a brother who is an employee of the Department of Corrections. She also felt she could be a fair juror; however, the prosecution was justified in challenging her because of the inference that she might have been the cause of the prior hung jury and could do the same in this trial. (See *People v. Rodriguez* (1999) 76 Cal.App.4th 1093, 1114 [finding reasonable use of peremptory challenge when prospective juror served on prior hung jury].)

Defendants protest that the prosecutor did not challenge another prospective juror who had previously been a juror in a case in which the jury did not reach a verdict. The *Box* court responded to a similar contention as follows: "Defendant argues, however, that these and the other bases stated by the prosecutor are insufficient because the prosecutor did not excuse other non-Black jurors who displayed similar characteristics. 'However, we have previously rejected a procedure that places an "undue emphasis on comparisons of the stated reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor," noting that such a comparison is one-sided and that it is not realistic to expect a trial judge to make such detailed comparisons midtrial.' [Citations.] 'In addition, we have observed that "the same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge."' [Citation.] 'Moreover, "the very dynamics of the jury selection process make

it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror [who] on paper appears to be substantially similar."' [Citation.]" (*People v. Box, supra,* 23 Cal.4th at p. 1190.)

Additionally, the defendants claim the prosecutor's challenges were suspect because he exercised them against African-American *women*. The analysis is the same, however. There were grounds for a reasonable challenge.

The trial judge, having participated in the jury selection process, was in the best position to determine under all the relevant circumstances whether there was a reasonable inference the African-American prospective jurors were challenged because of their group association. (See *People v. Box, supra,* 23 Cal.4th at p. 1189.) Because there were grounds for reasonable challenges against the African-American prospective jurors, we conclude there was no error.

VI

Admission of Adams's Confession

[Adams I]

Adams was arrested and interviewed by Detective Richard Dorricott. The interview lasted from 6:27 p.m. on August 8, 1998, to 3:45 a.m. the following morning. At the beginning of the interview, Detective Dorricott stated:

"The reason you're in -- uh -- custody, Tymel, is because of that property in your bedroom. Okay? And what we have is probable cause to believe that's stolen property. Okay? But

before I can talk to you -- before I can talk to you, what I have to do is read you your rights. Okay?"

He continued: "I want to get, you know, your side of the story on this. Okay. You have the right to remain silent. Anything you say may be used against you in a court. You have the right to the presence of any attorney before and during any questioning. If you cannot afford an attorney, one will be appointed for you free of charge before any questioning, if you want. Do you understand that?"

Adams responded that he understood, and Detective Dorricott continued: "Why don't you go ahead and tell me your side of the story. You know, what you know about that stuff in your bedroom then, if you want." During the lengthy interview, Adams made numerous incriminating statements.

Adams asserts his statements made to Detective Dorricott in which he admitted involvement in the burglary of Suter's apartment should have been excluded for violation of *Miranda v. Arizona, supra,* 384 U.S. 436. We conclude the assertion is without merit.

In a pretrial motion, Adams asserted his statements given to the detective were obtained under false pretenses and therefore were not voluntary. Specifically, he argued that, because the detective told him he was under investigation for theft and possession of stolen property and did not mention burglary or murder charges, the statement given by Adams had to be suppressed as involuntary. He additionally argued that his age, 18 years old at the time, and the fact that he had asked to

call his mother weighed against a finding of voluntariness. At the hearing on Adams's motion, his attorney argued again that the statement was involuntary. He added: ". . . [W]e're not talking about a *Miranda* violation. We're talking about an involuntary statement which you have to look at the totality."

As noted above, Adams asserts, on appeal, that his conviction must be reversed because of a *Miranda* violation. He claims the detectives "made no sincere effort to assure that [Adams], a[n] unsophisticated 18-year-old, either understood or truly waived his *Miranda* rights. . . . Accordingly, his confession was not voluntary, and therefore it was improperly admitted into evidence against him. Furthermore, this plain violation of *Miranda* was not harmless beyond a reasonable doubt, and constituted reversible error."

A defendant may not assert, on appeal, a *Miranda* violation when he did not object to introduction of the statement on that specific ground in the trial court. (Evid. Code, § 353, subd. (a); *People v. Visciotti* (1992) 2 Cal.4th 1, 54; *People v. Mattson* (1990) 50 Cal.3d 826, 853-854.) Because Adams did not contend in the trial court that the detective's advisements violated *Miranda*, he may not do so here.

In any event, there was no *Miranda* violation. Detective Dorricott properly advised Adams of his rights and Adams chose to talk to the detective rather than keep silent or request an attorney. After advising a suspect of his rights, the officer need not ask the suspect if he waives those rights. The suspect's responses to questioning are an effective, implicit

waiver. (*North Carolina v. Butler* (1979) 441 U.S. 369, 375-376 [60 L.Ed.2d 286].) The trial court did not err in admitting statements Adams made during questioning.

VII

Cruel or Unusual Punishment

[Adams IV]

Adams asserts his sentence, life without possibility of parole plus four years, violates the California and United States constitutions. Emphasizing his age at the time of the murder (18 years old), his asserted lack of culpability, his difficult childhood, and the vicarious nature of the felony-murder rule and the aiding and abetting doctrine, he claims the sentence constitutes cruel or unusual punishment. He rests this claim, mainly, on a comparison of the circumstances of this case to *People v. Dillon* (1983) 34 Cal.3d 441. This is not, however, a claim he made in the trial court. He made a motion at sentencing to dismiss the special circumstance, and he based the motion on the fact that the felony-murder rule leads to draconian results in this case. He did not, however, assert the sentence is cruel or unusual under the state or federal constitutions.

". . . *Dillon* makes clear that its holding was premised on the unique facts of that case. [Citation.] Since the determination of the applicability of *Dillon* in a particular case is fact specific, the issue must be raised in the trial court. Here, the matter was not raised below, and is therefore

waived on appeal. [Citation.]" (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.)

In arguing his case concerning cruel or unusual punishment, Adams relies heavily on the probation report, especially the part entitled "Personal Data." The sources of this information in the probation report were: "[i]nterview with the defendant, District Attorney's file, referral to Juvenile File #J-241,200, and prior arrest reports." Since defendant, himself, was a primary source of information, we cannot, with confidence, rely on the report. Because Adams did not object to the sentence based on the grounds of cruel or unusual punishment, there has been no credibility determination concerning this information. Furthermore, we are left to wonder if there is other relevant information that would have been presented to the trial court had Adams made an appropriate objection to the sentence. This is precisely why an objection must be made -- so that the trial court can determine, factually, the merit of the Adams's assertion.

By failing to make an appropriate objection in the trial court, Adams waived the issue of whether his sentence constitutes cruel or unusual punishment under the state and federal constitutions. (*People v. DeJesus, supra,* 38 Cal.App.4th at p. 27; see also *People v. Kelley* (1997) 52 Cal.App.4th 568, 583.)

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

SCOTLAND, P.J.

RAYE, J.